IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-878

IAN DECO LIGHTBOURNE,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR MARION COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Lightbourne's second successive motion for post-conviction relief. The following symbols will be used to designate references to the record in this appeal:

"R."—record on direct appeal to this Court;

"PC-R"—record on 3.850 appeal to this Court following the 1990-91 evidentiary hearings;

"PC-R2"—record on 3.850 appeal to this Court following the 1995-96 evidentiary hearings;

"PC-R2. Sup."—supplemental record on 3.850 appeal to this Court following the 1995-96 evidentiary hearings;

"PC-R3." —record on 3.850 appeal following the 1999 evidentiary hearing;

"PC-R3. Sup."—supplemental record on 3.850 appeal to this Court following the 1999 evidentiary hearing; and

"PC-R4" —record on 3.851 appeal to this Court following the denial of Mr. Lightbourne's 2006 successive 3.851 motion; and

"PC-R5"—record on 3.851 appeal to this Court following the denial of Mr. Lightbourne's 2010 second successive 3.851 motion

All other references will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Lightbourne requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

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STATEMENT OF CASE AND FACTS

A. Procedural History

On April 25, 1981, Mr. Lightbourne was convicted of first-degree murder in the circuit court of the Fifth Judicial Circuit, Marion County (R. 1436), and on May 1, 1981, he was sentenced to death (R. 1500).

On September 15, 1983, Mr. Lightbourne's conviction and sentence of death were affirmed on direct appeal.[1] *Lightbourne v. State*, 438 So. 2d 380 (Fla. 1983).

[1] Mr. Lightbourne raised the following issues in his direct appeal: (1) The indictment did not allege the time of the offense "as definitely as possible" under Florida Rule of Criminal Procedure 3.140(d)(3), the indictment was overbroad and vague, and the indictment could be construed as charging only felony murder and charging only felony murder and proving premeditated murder is impermissible; (2) The trial court erred in denying defendant's second motion to dismiss the indictment on the grounds that aggravating circumstances to be applied at the sentencing phase in capital felony cases must be originally alleged in the indictment in order to confer jurisdiction on a court to impose a sentence of death; (3) various constitutional challenges to Florida Statutes 775.082(1), 782.04(1), and 021.141 (1981); (4) Theodore Chavers was acting as an agent of the state during the time he shared a cell with the defendant and any statements that the defendant made to Chavers should have been suppressed because defendant did not know he was talking to a government agent and such statements were obtained in violation of his constitutionally guaranteed privilege against self incrimination and his right to counsel; (5) Personal items taken from the defendant at the time of his arrests on the weapons charge should have been held inadmissible in his trial on the murder charge; (6) Defendant's detention by Officer McGowan prior to his arrest on the concealed weapons charge constituted an illegal stop under the rationale of *Terry v. Ohio*, 392 U.S. 1 (1968); (7) Certain videotaped statements made by defendant should have been held inadmissible under the rationale of *Miranda v. Arizona*, 384 U.S. 436 (1966); (8) The trial court erred in denying defendant's motion to impose sanctions under Rule 3.220(j) for the state's failure to properly notify defendant of a deposition to be taken of a listed state witness; and (9) The death sentence was not justified because it was based on inappropriate aggravating circumstances, the

Justice Overton dissented and would have granted Mr. Lightbourne a new trial based on a *Henry*[2] violation.[3] Certiorari to the U.S. Supreme Court was denied on February 21, 1984. *Lightbourne v. Florida*, 465 U.S. 1051 (1984).

Mr. Lightbourne thereafter sought post conviction relief on May 31, 1985.[4] No evidentiary hearing was afforded, and relief was summarily denied the same

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court failed to consider an unenumerated mitigating circumstance, and the mitigating circumstances outweighed the aggravating circumstances.

[2] *United States v. Henry*, 447 U.S. 264 (1980).

[3] Justice Overton wrote:

> I reluctantly dissent because I find the recent United States Supreme Court decision in *United States v. Henry*, 447 U.S. 264 (1980), mandates a reversal under the circumstances of this case. A jailhouse informer was placed in a cell adjacent to appellant's and was requested to keep his ears open. The investigating officer understood that the informant expected something in return for his information, and the informant was paid two hundred dollars in cash, in addition to being released nineteen days early in return for his services. These factors make the informant an agent of the state under the dictates of *Henry*, which requires suppression of the statements made by the appellant to the informant in the absence of *Miranda* warnings. I find we have no choice but to grant a new trial.

Id. at 392 (Overton, J., dissenting).

[4] Mr. Lightbourne's 3.850 motion raised the following issues: (1) Lightbourne was entitled to the aid of experts; (2) trial counsel was ineffective at sentencing; (3) trial counsel's treatment of the jailhouse informers was a plain example of ineffective assistance; (4) trial counsel failed to investigate; (5) the prosecutor unlawfully struck black jurors; (6) the evidence was insufficient to sustain the verdict or the penalty; and (7) trial counsel was ineffective in not seeking jury sequestration.

day. This Court affirmed the summary denial of relief on June 3, 1985. *Lightbourne v. State*, 471 So. 2d 27 (Fla. 1985). Justices Overton, McDonald, and Shaw, dissented. *Id*. at 29.

Mr. Lightbourne thereafter filed a petition for writ of habeas corpus in district court on June 3, 1985, which was denied on August 20, 1986.[5] The Eleventh Circuit Court of Appeals affirmed the denial of federal habeas corpus relief on September 17, 1986, over the ardent dissent of Judge Anderson, who found that the *Henry* violation warranted a resentencing:

> [T]he error is not harmless with regard to sentencing. Chavers' testimony contained the only direct evidence of oral sexual assault on the victim as well as the only graphic descriptions of the sexual attack and comments by the defendant about the victim's anatomy. Since this evidence would support the existence of an aggravating circumstance, and since it was likely to have been influential with the jury on the sentencing issue, I cannot

[5] In his federal habeas petition, Mr. Lightbourne argued (1) that police interrogators violated *Miranda v. Arizona*, 384 U.S. 436 (1966), in the course of obtaining incriminating statements during custodial interrogation; (2) that he was denied the right to the assistance of counsel in violation of *Massiah v. United States*, 377 U.S. 201 (1964), and its progeny, by the admission of incriminating statements made to cellmate Chavers; (3) that an actual conflict of interest adversely affected his lawyer's representation in violation of his right to effective assistance of counsel under the rationale of *Cuyler v. Sullivan*, 446 U.S. 335 (1980); (4) that trial counsel was ineffective by the failure to adequately investigate petitioner's background and offer additional evidence of mitigating circumstances at the sentencing phase; (5) that trial counsel was ineffective in failing to object to the trial judge's consideration of the statements in the PSI report; and (6) trial counsel was ineffective in failing to request the sequestration of the jury between conviction and sentencing, but the court wouldn't consider the issue because it wasn't raised in the habeas petition.

> conclude that the testimony was harmless with regard to sentencing.

Lightbourne v. Dugger, 829 F.2d 1012, 1035 (11th Cir. 1987) (Anderson, J., concurring in part and dissenting in part).

On January 27, 1989, Mr. Lightbourne filed a petition for a writ of habeas corpus, which was denied on July 20, 1989.[6]

On January 30, 1989, Mr. Lightbourne filed his second Rule 3.850 motion, alleging new information establishing a *Brady*[7] violation with respect to jailhouse informants Chavers and Carson/Gallman.[8] This Court remanded for an evidentiary

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[6] In his petition for a writ of habeas corpus to this Court, Mr. Lightbourne argued that his appellate counsel was ineffective for failing to raise the following claims: (1) The sentencing court erred by failing to independently weigh aggravating and mitigating circumstances; (2) The trial court erroneously instructed the jury on aggravating circumstances that were duplicitous; (3) The "especially heinous, atrocious, or cruel" aggravating factor was unconstitutionally applied; (4) The "cold, calculated, and premeditated" aggravating circumstance was unconstitutionally applied; (5) The prosecutor and the court misled and misinformed the jury concerning their proper role in the sentencing proceedings; (6) The jury instructions could reasonably have been read as requiring the mitigating circumstances to be established beyond a reasonable doubt; (7) The sentencing instructions unconstitutionally shifted the burden of proof to the defendant; and (8) The court's instructions misled the jurors by informing them that a verdict of life imprisonment had to be rendered by a majority of the jury.

[7] *Brady v. Maryland*, 373 U.S. 83 (1963).

[8] In this 3.850 motion, Mr. Lightbourne argued (1) that the state deliberately used false and misleading testimony and intentionally withheld material exculpatory evidence; (2) that the State's unconstitutional use of jailhouse informants to obtain statements violated Mr. Lightbourne's constitutional rights; (3) that he was denied his constitutional rights because he was tried, convicted, and sentenced to death before a judge who was not impartial; and (4) that his trial

hearing. *Lightbourne v. Dugger*, 549 So. 2d 1364 (Fla. 1989). Evidentiary hearings were held in circuit court in 1990. The circuit court granted Mr. Lightbourne's April 17, 1991 motion to reopen the evidentiary hearing, and an additional hearing was conducted. The circuit court denied relief on June 12, 1992, and Mr. Lightbourne appealed. This Court affirmed on June 16, 1994. *Lightbourne v. State*, 644 So. 2d 54 (Fla. 1994). On January 28, 1995, Mr. Lightbourne filed a Petition for Writ of Certiorari to the U.S. Supreme Court, which was denied on March 27, 1995.

On November 7, 1994, Mr. Lightbourne filed a rule 3.850 motion requesting another evidentiary hearing to present additional evidence in support of his *Brady* claim.[9] A hearing was held on October 23 and 24, 1995. On February 23, 1996, Mr. Lightbourne filed a motion to reopen the hearing to present additional testimony and a motion to disqualify the state attorney. The circuit court held a

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counsel was ineffective for failing to present mitigating evidence at the sentencing phase of his trial.

[9] In this 3.850 motion, Mr. Lightbourne argued that: 1) he was denied an adversarial testing when critical, exculpatory evidence was not presented to the jury during the guilt or penalty phase of his trial, 2) the State's unconstitutional use of jailhouse informants to obtain statements violated Mr. Lightbourne's Fifth, Sixth, Eighth, and Fourteenth Amendment rights; 3) access to files and records pertaining to Mr. Lightbourne's case in the possession of certain state agencies has been withheld in violation of Chapter 119, Fla. Stat., and Mr. Lightbourne cannot prepare an adequate Rule 3.850 motion until he has received public records materials and been afforded due time to review those materials and amend; 4) Mr. Lightbourne is innocent of the death sentence.

hearing on these motions on March 15, 1996, and denied both motions. The circuit court denied relief on June 19, 1996. On appeal, this Court held that Mr. Lightbourne was not barred from presenting the testimony of Larry Bernard Emanuel, an inmate who was incarcerated with Mr. Lightbourne prior to trial, and remanded "for an evidentiary hearing as to Emanuel's testimony and for the trial court to consider the cumulative effect of the post-trial evidence in evaluating the reliability and veracity of Chavers' and Carson's trial testimony in determining whether a new penalty phase is required." *Lightbourne v. State*, 742 So. 2d 238 (Fla. 1999). The evidentiary hearing occurred on December 2, 1999 (PC-R2. 911-1088). On February 26, 2001, the circuit court denied relief. (*Id*. at 1395-97).

On March 12, 2001, Mr. Lightbourne filed a 3.850 appeal, which was denied on January 16, 2003. On June 17, 2003, Mr. Lightbourne filed a Petition for Writ of Certiorari in the U.S. Supreme Court, which was denied on November 10, 2003.

Mr. Lightbourne thereafter filed a Petition for Writ of Habeas Corpus in this Court on June 18, 2003, which was denied on August 17, 2004.[10] On February 14, 2005, Mr. Lightbourne filed a Petition for Writ of Certiorari in the U.S. Supreme Court, which was denied on June 20, 2005.

[10] In this petition, Mr. Lightbourne argued that Florida's capital sentencing procedures, as employed in his case, violated his Sixth Amendment right to have a unanimous jury return a verdict addressing his guilt of all the elements necessary for the crime of capital first degree murder, in violation of *Ring v. Arizona*, 536 U.S. 584 (2002).

On February 27, 2006, Mr. Lightbourne filed a successive rule 3.851 motion, alleging that his rights under the Vienna Convention had been violated and that Florida's lethal injection statute as well as the existing procedure by which Florida carries out executions by lethal injection violate the Florida and U.S. Constitutions (PC-R4. 1-108). The circuit court denied his motion without an evidentiary hearing and Mr. Lightbourne appealed to this Court. On December 14, 2006, after the State had filed its answer brief, Mr. Lightbourne filed an all writs petition in this Court based on the events that occurred during the botched execution of Angel Diaz. This Court thereafter relinquished jurisdiction to the circuit court and the circuit court denied relief on Mr. Lightbourne's lethal injection challenge after an evidentiary hearing. This Court affirmed the circuit court's denial of relief on November 1, 2007, *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007), and the United States Supreme Court denied Mr. Lightbourne's petition for a writ of certiorari on May 19, 2008. *Lightbourne v. McCollum*, 553 U.S. 1059 (2008).

On November 29, 2011, Mr. Lightbourne filed a second successive Rule 3.851 motion based on the recent United States Supreme Court opinion in *Porter v. McCollum*, 130 S. Ct. 447 (2009). PC-R5 1-30. The circuit court held a case management conference on February 23, 2011, and thereafter summarily denied Mr. Lightbourne's motion on March 29, 2011. PC-R5. 151-48. Mr. Lightbourne

timely filed a notice of appeal, PC-R5. 208-10, and this appeal follows.

B. Trial and Sentencing

The only evidence trial counsel presented in mitigation was the testimony of Mr. Lightbourne that consisted of less than three transcript pages. Mr. Lightbourne told the jury that he was 21 years old, a Bahamian citizen, a high school graduate, and had never been convicted of a crime before. The trial court found two mitigating factors: 1) no significant history of prior criminal activity; and 2) the defendant was 21 at the time of the offense. (R. 1187-92).

The trial court also found the following aggravating circumstances: 1) committed in the commission of a burglary and a sexual battery; 2) committed for the purpose of avoiding or preventing a lawful; 3) committed for pecuniary gain; 4) especially heinous, atrocious, or cruel; and 5) committed in a cold and calculated and premeditated manner without any pretense of moral or legal justification. *Id*.

C. Postconviction Proceedings

i. Ineffective assistance of counsel claim

In postconviction, Mr. Lightbourne alleged that had his counsel conducted a proper mitigation investigation, he would have been able to present to the jury evidence that Ian Lightbourne was born at home in the Bahamas, without medical assistance, in 1959. His parents were never married and his father deserted the family to live with another woman shortly after Ian's birth. He never offered any

assistance or support to his family. Ian was raised in an area called Dumping Ground Corners—so named because it had formerly been the site of a public refuse dump—amidst abject poverty and squalor. Most of the homes in the area were the most rudimentary of shacks, consisting of one or two rooms without running water or sanitary facilities, often occupied by eight or more people.

Ian's mother, Naomi Neely, was illiterate and supported Ian and her nine other children by working several regular jobs and preparing and selling food out of her home. The family was deeply religious, and was intimately involved with the Catholic church. Ian was the head alter boy at the local church, serving mass weekly from the age of seven until he left the Bahamas at age seventeen.

Ian was a model child and an A student at St. Joseph's grammar school. The support in the community for Ian was unanimous and overwhelming, as evidenced by the seventeen letters of support from members of Ian's community proffered by post-conviction counsel, as well as a letter of support signed by 53 members of Ian's township. The elderly people in the community remembered Ian for his perfect manners and the respect he always showed them. Many grew to depend on Ian's help in performing chores and running errands, such as bringing water from the communal pump and retrieving groceries. Ian was also a talented athlete and handyman.

Those who knew him are in unanimous agreement that Ian was one of the

most nonviolent, non-argumentative, and congenial persons they had ever known. Ian was never in any serious trouble at school or in the streets, and was remembered as being cooperative and honest by teachers at his high school. No one could reconcile his conviction with the character and reputation he displayed in the community. The only trouble anyone could remember Ian being involved in was an incident at age sixteen. His mother described: "[A] retarded man in the neighborhood, who was a big man who often picked on the children, was drunk and pulled a knife on Ian and shoved him down in the street. Ian started to cry when this happened and threw some rocks at him out of fear. Ian was taken to the police station and was lashed for throwing stones." (Affidavit of Naomi Neely).

The flip side of Ian's outwardly normal life was the turmoil he suffered at home, especially at the hands of his older brother, Stan McNeil. Ian, like most males his age in the community, had an interest in horses and a pervasive desire to be a successful jockey. Until 1973, there was a horsetrack in the area which employed many of the local men. Stan McNeil had been a successful jockey, locally famous for his riding skills. As the oldest male in the family, Stan was naturally admired by Ian, and also idolized for his success as a jockey. Ian's interest in horses no doubt arose in part as an attempt to emulate Stan.

Stan, on the other hand, did not return Ian's admiration and respect. Stan's reputation in the family and the community was that of a tyrannical despot given to

violent episodes of temper aggravated by his drinking problem, and Ian was the usual subject of these unprovoked outbursts:

> Stan always drank a lot and it made his head bad… [He] is nine years older than Ian and would always pick on Ian because Ian would let him get away with it. When Stan would tell Ian to do something, Ian would always obey him, even if he was just being mean. When Stan was drinking… he would beat Ian just because he felt like it. Stan would beat Ian three times a week.

(Affidavit of Naomi Neely). The beatings inflicted upon Ian were severe, on several occasions resulting in his hospitalization. Stan kept a horsewhip at home for the purpose of beating Ian, and often employed other hard objects, such as rocks and bottles, to inflict his punishment. On one occasion, Stan beat him about the head so severely that his head swelled, requiring medical attention and medication. On another occasion, Stan threw a hatchet at Ian and hit him in the arm, inflicting a deep wound which required stitches and left a scar that remains to this day.

The beatings ultimately took their psychological, as well as physical, toll on Ian. As related by Mrs. Neely, "[T]he beatings by Stan made Ian very jumpy as he grew up. One night when Ian was about sixteen or seventeen he was pitching in his sleep and I went in to see what was wrong. He said he felt real bad and couldn't sleep because he kept seeing things in the room." As a result of this episode, Mrs. Neely took Ian to see a psychiatrist, who interviewed Ian and asked that he return.

When Stan found out, he beat Ian on the head with a shoe for waking his mother in the middle of the night. Upon Ian's return to the psychiatrist, the doctor learned of Ian's situation at home and requested that he return with Stan and his sisters. Stan, of course, refused to visit the psychiatrist, and Ian never received the psychiatric counseling he so obviously needed.

The inner turmoil caused by his relationship with Stan was also reflected in Ian's school work. His grades began slipping and his teachers became concerned about his lethargic behavior. Some concerned school administrators, noticing that he seemed upset with his home situation, attempted to help him, but failed to uncover the cause of his problems, the physical abuse inflicted by Stan. Ian became more and more obsessed with his dream of becoming a successful jockey like Stan, and at one time expressed in an interview with his high school guidance counselor his overwhelming desire to be a horse.

The continuing conflicts caused by his love/ hate relationship with Stan ultimately led Ian to flee his home in Dumping Ground Corners for the United States, both to escape the brutal domination of Stan and to emulate his success as a horseman. Mrs. Neely begged Ian to stay and further his education, but she "always knew that he left because he couldn't stand being hurt by Stan anymore." Ian's dream of becoming a successful jockey soon soured, and he found himself working in a position little better than stable-boy at Ocala Stud Farms. Although he

had successfully escaped Stan's brutality, his attempt at emulating Stan, becoming his equal and thereby compensating for the brutality and humiliation suffered at his hands, was frustrated.

The circuit court denied the claim in a one-page order without an evidentiary hearing and without any analysis—or even mention—of Mr. Lightbourne's claims, and this Court affirmed. *Lightbourne v. State*, 471 So. 2d 27, 28 (Fla. 1985). The entirety of this Court's prejudice analysis was as follows:

> Counsel was not ineffective for failing to present mitigating evidence at sentencing. The trial record clearly indicates that the sentencing judge was in fact aware of many of the mitigating factors that counsel on appeal is now presenting to the Court. The lower court was fully aware of the fact that Lightbourne was raised in a "lower socioeconomic home environment," his educational history and religious background. The additional mitigating factors now presented to the Court are merely cumulative, not new. Thus our finding on direct appeal that the strength of the aggravating factors warrant the death sentence is still valid.

Id. at 28.

In a successive postconviction motion, Mr. Lightbourne also alleged that his trial counsel was ineffective for failing to ask Dr. George Barnard, the expert retained at trial, for any information related to mitigation. Had he done so, Dr. Barnard would have presented compelling mitigation regarding Mr. Lightbourne's history of abuse by his brother, lifetime history of severe alcohol and drug abuse, deficits in memory, and history of suicidal thoughts. Dr. Barnard also would have

testified that prolonged and continuous substance abuse without treatment impairs judgment and control, and affects one's emotions, thought processes, and behavior. Mr. Lightbourne also alleged that he had been evaluated in postconviction by Dr. Joyce Carbonell, a clinical psychologist. After reviewing background materials and evaluating Mr. Lightbourne, Dr. Carbonell reached an opinion regarding extensive, compelling mitigation that was not offered at trial. Dr. Carbonell conducted neuropsychological testing that revealed that Mr. Lightbourne suffered from brain damage, in addition to a history of depression accompanied by suicidal ideation, paranoid symptomatology, and chronic long-term drug and alcohol abuse. Dr. Carbonell opined that the combination of these factors would create an emotional disturbance. Additionally, given Mr. Lightbourne's organic brain damage and alcohol and drug abuse, Dr. Carbonell opined that Mr. Lightbourne's ability to conform his conduct to the requirements of law would have been substantially impaired.

ii. *Brady* claim

In postconviction, Mr. Lightbourne also alleged that Theodore Chavers and Theophilus Carson, both of whom testified at his trial regarding incriminating statements made by Mr. Lightbourne while in the county jail, were acting in concert with the State to obtain the statements and that the State withheld information regarding its agency relationship with Chavers and Carson and

withheld the untruthfulness of the statements, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). In support of his *Brady* claim, Mr. Lightbourne alleged that law enforcement officers had also solicited Mr. Lightbourne's county jail cellmate, Larry Emanuel, to get information from Mr. Lightbourne and promised Emanuel that his burglary charge would be dropped if he got information. After several evidentiary hearings, the circuit court concluded that neither Emanuel, nor Chavers, nor Carson were credible, that all the jailhouse informants were acting out of self-interest, that no reasonable juror would have believed Chavers or Carson except where their testimony was corroborated by independent evidence, and that none of them were acting as agents solicited by the State. The court also concluded, without further comment, that there was "no reasonable probability that a new penalty phase hearing would result in a different result as to the imposition of the death penalty." This Court affirmed the circuit court's denial of relief.

SUMMARY OF THE ARGUMENT

The United States Supreme Court's decision in *Porter v. McCollum*, 130 S. Ct. 447 (2009) represents a fundamental repudiation of this Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in law as explained herein, which renders Mr. Lightbourne's *Porter* claim cognizable in these postconviction proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980). *Porter* establishes that the previous denial of Mr. Lightbourne's ineffective assistance of counsel and

Brady claims were premised upon this Court's case law misreading and misapplying *Strickland v. Washington*, 466 U.S. 668 (1984) and *Brady v. Maryland*, 373 U.S. 83 (1963).

STANDARD OF REVIEW

Mr. Lightbourne has presented several issues which involve mixed questions of law and fact. Thus, a de novo standard applies. *Bruno v. State*, 807 So. 2d 55, 61-62 (Fla. 2001).

ARGUMENT

THE U.S. SUPREME COURT'S DECISION IN *PORTER V. MCCOLLUM* DEMONSTRATES THAT THIS COURT FAILED TO CONDUCT A PROPER PREJUDICE ANALYSIS UNDER WHEN CONSIDERING MR. LIGHTBOURNE'S PENALTY PHASE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM AND *BRADY* CLAIM.

A. *Porter v. McCollum*.

In 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA) limiting the circumstances under which a defendant may obtain relief in federal habeas proceedings. Under the AEDPA, any claim that was adjudicated on the merits must be reviewed in accordance with certain limitations:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of that claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). It was in the context of this strict standard that the United

States Supreme Court agreed with the district court's grant of relief in *Porter v. McCollum:* "The Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough—or even cursory—investigation is unreasonable. The Florida Supreme Court either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing." *Porter v. McCollum*, 130 S. Ct. 447, 454-55 (2009). This was not simply a case in which the high court merely disagreed with the outcome or even a case where the United States Supreme Court decided that this Court's decision in *Porter v. State* was just wrong. Rather, the United States Supreme Court held that the decision was so unreasonable that the usual concerns of federalism, as codified by the AEDPA, were not sufficient to allow the death sentence to stand.

In *Strickland v. Washington*, the United States Supreme Court found that, in order to ensure a fair trial, the Sixth Amendment requires that defense counsel provide effective assistance to defendants by "bring[ing] to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. 668, 685 (1984) . Where defense counsel renders deficient performance, a new resentencing is required if that deficient performance prejudiced the defendant such that confidence is undermined in the outcome. *Id*. at 694. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different." *Id*. at 694.

> When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 695.

The search for that reasonable probability must be conducted in a particular manner. Courts must "engage with [mitigating evidence]," *Porter*, 130 S. Ct. at 454, in considering whether that evidence might have added up to something that would have mattered to the jury. Courts have a "'[] duty to search for constitutional error with painstaking care [which] is never more exacting than it is in a capital case.'" *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (citing *Burger v. Kemp*, 483 U.S. 776, 785 (1987)). In performing the duty to search with painstaking care for a constitutional violation by engaging with mitigating evidence, courts must "'speculate' as to the effect" of non-presented evidence. *Sears v. Upton*, 130 S. Ct. 3266, 3266-67 (2010). The *Porter/Kyles/Sears* conception of the *Strickland* prejudice inquiry requires courts to **engage with** mitigating evidence and painstakingly search for a constitutional violation by speculating as to how the mitigating evidence might have changed the outcome of the penalty phase. It is clear that the focus of a court's prejudice inquiry must be to **try to find a**

constitutional violation. The duty to search for a constitutional violation with painstaking care is a function of the fact that a constitutional violation in a capital case is a matter of such profound repugnance that it must be sought out with vigilance. Courts must **search** for it carefully, not dismiss the possibility of it based on information that suggests it isn't there. And looking for a reasonable possibility that a violation did not occur reverses the standard of the inquiry, because if a court simply focuses on all the ways the non-presented evidence might reasonably have not mattered, it is not answering the question of whether it reasonably may have. If a court simply speculates as to how a constitutional violation might not have occurred, it is not performing its duty to engage with mitigating evidence to painstakingly speculate as to how a violation might have occurred.

B. Mr. Lightbourne's *Porter* claim is cognizable under *Witt* and rule 3.851

The *Porter* decision establishes that the previous denial of Mr. Lightbourne's ineffective assistance of counsel and Brady claims were premised upon this Court's case law which misread and misapplied *Strickland v. Washington*, 466 U.S. 668 (1984) and *Brady v. Maryland*, 373 U.S. 83 (1963). While *Porter* dealt specifically with this Court's unreasonable application of *Strickland*, its reasoning applies with full force to this Court's treatment of Mr. Lightbourne's *Brady* claim, as the *Strickland* standard of prejudice is identical to the *Brady* standard of materiality, i.e., that relief must be granted when there is a reasonable probability

that, but for counsel's unprofessional errors (*Strickland*) or the State's suppression of evidence (*Brady*), the result of the proceeding would have been different. *See United States v. Bagley*, 473 U.S. 667, 682 (1985).

The United States Supreme Court's decision in *Porter* represents a fundamental repudiation of this Court's *Strickland* jurisprudence, and as such *Porter* constitutes a change in law as explained herein, which renders Mr. Lightbourne's *Porter* claim cognizable in these postconviction proceedings. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980). A Rule 3.851 motion is the appropriate vehicle to present Mr. Lightbourne's claim premised upon the change in Florida law that *Porter* represents. *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989) (holding that claims under *Hitchcock v. Dugger*, 481 U.S. 393 (1987), a case in which the United States Supreme Court found that this Court had misread and misapplied *Lockett v. Ohio*, 438 U.S. 586 (1978), should be raised in Rule 3.850 motions).

The circuit court denied Mr. Lightbourne's *Porter* claim, finding the motion to be untimely, successive, and procedurally barred. (PC-R5. 156). However, in *Witt v. State*, this Court determined when changes in the law could be raised retroactively in postconviction proceedings, finding that "[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications." 387 So. 2d at 925.

This Court recognized that "a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice." *Id*. "Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." *Id.* (quotations omitted).

As "the concept of federalism clearly dictates that [states] retain the authority to determine which changes of law will be cognizable under [their] post-conviction relief machinery," *id*. at 928, this Court declined to follow the line of United States Supreme Court cases addressing the issue, which it characterized as a "relatively unsatisfactory body of law." *Id*. at 926 (quotations omitted). The United States Supreme Court recently held that a state may indeed give a decision by the United States Supreme Court broader retroactive application than the federal retroactive analysis requires. *Danforth v. Minnesota*, 552 U.S. 264 (2008).

While referring to the need for finality in capital cases on the one hand, citing Justice White's dissent in *Godfrey v. Georgia* for the proposition that the United States Supreme Court in *Godfrey* endorsed the previously rejected argument that "government, created and run as it must be by humans, is inevitably incompetent to administer [the death penalty]," 446 U.S 420, 455 (1980), the Court

found on the other hand that capital punishment "[u]niquely . . . connotes special concern for individual fairness because of the possible imposition of a penalty as unredeeming as death." *Witt*, 387 So. 2d at 926.

The *Witt* Court recognized two "broad categories" of cases which will qualify as fundamentally significant changes in constitutional law: (1) "those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties" and (2) "those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* and *Linkletter*." *Witt*, 387 So. 2d at 929. The Court identified under *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965), three considerations for determining retroactivity: "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." *Id*. at 926.

In addition to limiting the types of cases that can create retroactive changes in law, *Witt* limits which courts can make such changes to this Court and the United States Supreme Court. *Id.* at 930. This Court summarized its holding in *Witt* to be that a change in law can be raised in postconviction if it: "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance . . . ." *Id*. at 931.

After enunciating the *Witt* standard for determining which judicial decisions warranted retroactive application, this Court had occasion to demonstrate the manner in which the *Witt* standard was to be applied shortly after the United States Supreme Court issued its decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987). In *Hitchcock*, the United States Supreme Court had issued a writ of certiorari to the Eleventh Circuit Court of Appeals to review its decision denying federal habeas relief to a petitioner under a sentence of death in Florida. In its decision reversing the Eleventh Circuit's denial of habeas relief, the United States Supreme Court found that the death sentence rested upon this Court's misreading of *Lockett v. Ohio* and that the death sentence stood in violation of the Eighth Amendment. Shortly after the United States Supreme Court issued its decision in *Hitchcock*, a death sentenced individual with an active death warrant argued to this Court that he was entitled to the benefit of the decision in *Hitchcock*. Applying the analysis adopted in *Witt*, this Court agreed and ruled that *Hitchcock* constituted a change in law of fundamental significance that could properly be presented in a successor Rule 3.850 motion. *Riley v. Wainwright*, 517 So. 2d 656, 660 (Fla. 1987); *Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987); *Downs v. Dugger*, 514 So. 2d 1069, 1070 (Fla. 1987); *Delap v. Dugger*, 513 So. 2d 659, 660 (Fla. 1987); *Demps v. Dugger*, 514 So. 2d 1092 (Fla. 1987).

In *Lockett v. Ohio*, the United States Supreme Court had held in 1978 that

mitigating factors in a capital case cannot be limited such that sentencers are precluded from considering "any aspect of a defendant's character or record and any of the circumstances of the offense." 438 U.S. 586, 604 (1978). This Court interpreted *Lockett* to require a capital defendant merely to have had the opportunity to present any mitigation evidence. This Court decided that *Lockett* did not require the jury to be told through an instruction that it was able to consider nonstatutory mitigating circumstances that mitigating evidence demonstrated were present when deciding whether to recommend a sentence of death. *See Downs v. Dugger*, 514 So. 2d at 1071; *Thompson v. Dugger*, 515 So. 2d at 175. In *Hitchcock*, the United States Supreme Court held that this Court had misunderstood what *Lockett* required. By holding that the mere opportunity to present any mitigation evidence satisfied the Eighth Amendment and that it was unnecessary for the capital jury to know that it could consider and give weight to nonstatutory mitigating circumstances, the United States Supreme Court held that this Court had in fact violated *Lockett* and its underlying principle that a capital sentencer must be free to consider and give effect to any mitigating circumstance that it found to be present, whether or not the particular mitigating circumstance had been statutorily identified. *See id.* at 1071.

This Court found that *Hitchcock* "represents a substantial change in the law" such that it was "constrained to readdress . . . *Lockett* claim[s] on [their] merits."

Delap, 513 So. 2d at 660 (citing, inter alia, *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987)). In *Downs*, this Court found a postconviction *Hitchcock* claim could be presented in a successor Rule 3.850 motion because "*Hitchcock* rejected a prior line of cases issued by this Court." *Downs*, 514 So. 2d at 1071. Clearly, this Court read the opinion in *Hitchcock* and saw that the reasoning contained therein demonstrated that it had misread *Lockett* in a whole series of cases. This Court's decision at issue in *Hitchcock* was not some rogue decision, but in fact reflected the erroneous construction of *Lockett* that had been applied by this Court continuously and consistently in virtually every case in which the *Lockett* issue had been raised. And in *Thompson* and *Downs*, this Court saw this and acknowledged that fairness dictated that everyone who had raised the *Lockett* issue and lost because of its error, should be entitled to the same relief afforded to Mr. Hitchcock.

The same principles at issue in *Delap* and *Downs* are at work here. Just as *Hitchcock* reached the United States Supreme Court on a writ of certiorari issued to the Eleventh Circuit, so too did *Porter*. Just as in *Hitchcock* where the United States Supreme Court found that this Court's decision affirming the death sentence was contrary to or an unreasonable application of *Lockett*, a prior decision from the United States Supreme Court, here in *Porter*, the United States Supreme Court found that this Court's decision affirming the death sentence was contrary to or an unreasonable application of *Strickland*, a prior decision from the United States

Supreme Court. This Court's analysis from *Downs* is equally applicable to *Porter* and the subsequent decision further explaining *Porter* that issued in *Sears*. As *Hitchcock* rejected this Court's analysis of *Lockett*, *Porter* rejects this Court's analysis of *Strickland* claims. Just as this Court found that others who had raised the same *Lockett* issue that Mr. Hitchcock had raised and had lost should receive the same relief from that erroneous legal analysis that Mr. Hitchcock received, so too those individuals that have raised the same *Strickland* issue that Mr. Porter had raised and have lost should receive the same relief from that erroneous legal analysis that Mr. Porter received.

C. *Porter* is not limited to its facts

The circuit court erred in finding that the U.S. Supreme Court's *Porter* opinion is confined to the facts of the Porter case. (PC-R5. 155). Mr. Lightbourne has not argued or suggested that *Porter* represents a change in the evaluation of prejudice under federal law; rather, it represents a change in how **this Court** has approached that analysis under *Strickland*. In other words, the fact that this Court cited to *Strickland's* test does not mean that the required painstaking search for constitutional error has taken place. *See, e.g., Rodriguez v. State*, 39 So. 2d 275, 285 (Fla. 2010). In *Sears v. Upton*, the United States Supreme Court noted that **"[a]lthough the court appears to have stated the proper prejudice standard, it did not correctly conceptualize how that standard applies to the**

circumstances of this case." *Sears*, 130 S.Ct. at 3264 (emphasis added).

An analysis of this Court's jurisprudence demonstrates that the *Strickland* analysis employed in *Porter v. State* was not an aberration, but indeed was in accord with a line of cases from this Court. In *Sochor v. State*, 883 So. 2d 766, 782-83 (Fla. 2004) this Court relied upon the language in *Porter v. State* to justify its rejection of the mitigating evidence presented by the defense's mental health expert at a postconviction evidentiary hearing. This Court in *Sochor* also noted that its analysis in *Porter v. State* was the same as the analysis that it had used in *Cherry v. State*, 781 So. 2d 1040, 1049-51 (Fla. 2001).

Indeed, in *Porter v. State*, this Court referenced its decision in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), where this Court noted some inconsistency in its jurisprudence as to the standard by which it reviewed a *Strickland* claim presented in postconviction proceedings. In *Stephens*, this Court noted that its decisions in *Grossman v. Dugger*, 708 So. 2d 249 (Fla. 1997) and *Rose v. State*, 675 So. 2d 567 (Fla. 1996), were in conflict as to the level of deference that was due to a trial court's resolution of a *Strickland* claim following a postconviction evidentiary hearing. In *Grossman*, this Court had affirmed the trial court's rejection of Mr. Grossman's penalty phase ineffective assistance of counsel claim because "competent substantial evidence" supported the trial court's decision. In *Rose*, this Court employed a less deferential standard. As explained in *Stephens*, this Court in

Rose "independently reviewed the trial court's legal conclusions as to the alleged ineffectiveness of the defendant's counsel." *Stephens*, 748 So. 2d at 1032. This Court in *Stephens* indicated that it receded from *Grossman*'s very deferential standard in favor of the standard employed in *Rose*. However, this Court made clear that even under this less deferential standard

> [w]e recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact. The deference that appellate courts afford findings of fact based on competent, substantial evidence is in an important principle of appellate review.

Stephens v. State, 748 So. 2d at 1034. Indeed in *Porter v. State*, this Court relied upon that very language in *Stephens v. State* as requiring it to discount and discard the testimony of Dr. Dee which had been presented by Mr. Porter at the postconviction evidentiary hearing. *Porter v. State*, 788 So. 2d at 923. *Porter v. State* was not an aberration; rather, it was based on this Court's case law. *Id.* at 923.

D. *Porter* requires a re-evaluation of Mr. Lightbourne's penalty phase ineffective assistance of counsel claim.

This Court's previous conclusion that Mr. Lightbourne was not prejudiced by his counsel's failure to present this mitigation was not the result of a probing, fact-specific *Strickland* analysis as required by *Porter* and *Sears*. Just as in *Porter*, in Mr. Lightbourne's case, the postconviction court and this Court either did not

consider or unreasonably discounted the extensive and compelling mitigation evidence alleged in postconviction. The jury and sentencing judge heard nothing about the brutal beatings Mr. Lightbourne suffered at the hands of his brother, or the abject poverty he grew up in, or what a kind and helpful member of the community he was. Yet this Court, in one paragraph, discounted entirely the effect that this evidence might have had on the jury or sentencing judge, which *Porter* and *Sears* make clear is an unreasonable application of *Strickland*. Mr. Lightbourne is entitled to an appropriate analysis of prejudice under *Porter* and an evidentiary hearing or relief thereafter.

D. *Porter* requires a re-evaluation of Mr. Lightbourne's *Brady* claim.

This Court's deference to the circuit court's credibility findings on the *Brady* claim cannot be reconciled with its conclusion that there is no reasonable probability that the result of the proceeding would have been different. The circuit court essentially concluded that the informants were lying at trial, yet this Court either did not consider or unreasonably discounted the resulting penalty phase prejudice. The lower court concluded—and this Court agreed—that "all the jailhouse informants were acting out of self-interest and hope of personal gain" and the informants "would say almost anything to help themselves" and "no reasonable juror would place much credence in the testimony of these informants" (PC-R3. 1396). These precise findings, referring to the informants' trial testimony,

undermine confidence in the outcome of the penalty phase. Just as this Court's cursory analysis of prejudice in Porter's case was an unreasonable application of *Strickland*, the court's analysis of materiality in Mr. Lightbourne's case was an unreasonable application of *Brady*, in violation of the United States Supreme Court's decision in *Porter*.

As this Court discussed in its 1999 opinion in Mr. Lightbourne's case, the evidence supporting several of the aggravators came solely from the testimony of Chavers and Carson. On direct appeal, the court affirmed the trial court's finding of the following aggravating factors: commission during a burglary and sexual battery; avoiding arrest; pecuniary gain; heinous, atrocious or cruel. *Lightbourne v. State*, 438 So. 2d 380, 390-91 (Fla. 1983). The facts relied on by the court in upholding those aggravating factors focused on the evidence that there was a sexual assault which came **exclusively from the testimony of Chavers and Carson**.[11] In support of the commission of the felony aggravating factor alleging sexual assault, the court noted that "[t]estimony revealed that the defendant had admitted surprising the victim in her home" and that "[d]uring the burglary the victim was forced into acts of oral sex and intercourse as she begged him not to kill

[11] *See Lightbourne v. Dugger*, 829 F.2d 1012, 1035 (11th Cir. 1987) (Anderson, J., concurring in part and dissenting in part) ("Chavers' testimony contained the only direct evidence of oral sexual assault on the victim as well as the only graphic descriptions of the sexual attack and comments by the defendant about the victim's anatomy").

her." *Id*. These details are directly from Mr. Chavers' testimony:

> He said that Ms. O'Farrell was coming out of either the shower and by him being in and her being alone and not knowing anyone was in the house, it was -- he surprised her. . . . Well, he just described it to me that she was -- she was begging him not to kill her, and he told her he wasn't going to kill her, and they had sex. He told her to get on the bed. She -- they had oral sex, you know, over and over.

(R. 1115-16). Carson also testified that Mr. Lightbourne told him that "he made her have sex with him" and that "she screamed, hollered" when he entered the house. (R. 1176-77).

In support of the avoiding arrest aggravating factor, this Court stated that the "[d]efendant admitted knowing the victim. Plainly the defendant killed to avoid identification and arrest. Proof of the requisite intent to avoid detection is strong in this case." *Lightbourne*, 438 So. 2d at 391. The only evidence that Mr. Lightbourne allegedly shot O'Farrell because she could identify him came from Carson's testimony. (R. 1180).

This Court also rejected on direct appeal Mr. Lightbourne's argument that the trial court had improperly doubled the pecuniary gain and during the commission of a robbery aggravating factors because "[t]here was adequate proof of rape" and "the trial court does not improperly duplicate robbery and pecuniary gain where defendant committed the crime of rape in conjunction with the murder." *Id*. Again, Chavers and Carson were the only source of information that a

sexual battery occurred.

In support of the heinous, atrocious, or cruel aggravating factor, this Court again relied on the evidence that a sexual assault had occurred:

> Taking into consideration the totality of the circumstances in this case, the murder and the events leading up to its consummation were carried out in an unnecessarily torturous way toward the victim. The record reflects that **the victim was forced to submit to sexual relations with defendant prior to her death, while pleading for her life**, and we cannot say that the trial court's finding of heinousness is at material variance with the facts.

Id. (emphasis added). As in the discussion of during the commission of a sexual assault aggravating factor, this language mirrors the testimony of Chavers and Carson.

Chavers testified in detail that Mr. Lightbourne confessed to raping Ms. O'Farrell before killing her (R. 1115-16), and Carson provided similar testimony (R. 1176-77). However, the investigation and physical evidence did not provide any evidence of a sexual assault. Lieutenant LaTorre testified at the evidentiary hearing:

> Q When you arrived at the scene of the homicide was there any evidence that indicated to you at that time that the victim had been sexually battered?
> A Not that I would have been specifically cognizant of at that time.
> Q Okay. In fact, what was this -- was the victim clothed at the time you arrived at the scene?
> A Partially, yes.

> Q Okay. Could you explain to the Court what she was wearing?
> A She was wearing a bra and panties.
> Q Was there any indication at the scene that there had been a struggle?
> A Not really, no.

(PC-R. 1180). Dr. Gertrude Warner, the medical examiner, testified at the trial and agreed that there was no evidence to indicate that a sexual assault had occurred (R. 742, 763). Dr. Warner also testified that there was no indication that O'Farrell had engaged in oral sex, contradicting Chavers' testimony that Mr. Lightbourne forced her to perform oral sex "over and over" (R. 1116). Thus, Chavers and Carson were the only sources of evidence for these details that were used to support numerous aggravating factors. Without this testimony, the State could not have argued for the death penalty.[12]

Moreover, prosecutor Simmons admitted in his opening statement that without Chavers and Carson, the State's case was entirely circumstantial (R. 603-04). Mr. Fox and Mr. Burke, who represented Mr. Lightbourne, testified that without the testimony of Chavers and Carson, the State would not have been able to argue for a death sentence (PC-R. 50, 274). Burke explained the impact of the testimony of these two witnesses:

> [T]he role that those two witnesses played was a crucial one because it changed the nature of the case from being

[12] The State conceded at the 1995 hearing that there was no other evidence, aside from Chavers and Carson, proving a sexual assault (PC-R2. 672).

> bookended with a murder weapon that was used to inflict the deadly shot, to being one where there was [sic] now two people saying that, from the Defendant's own mouth, that he had, in fact, committed not only this homicide, but had done other actions which constituted the bases of the indictment or, in this case, which was the sexual battery and/or burglary theft.
>
> And it also introduced the aggravating factor or pecuniary gain in connection with another felony; and by saying that it was to eliminate a witness, throwing in another aggravating factor, potentially cold, calculated and premeditated, to avoid a lawful arrest.
>
> So many of the aggravating factors in this case, as well as the judgment of acquittal phase, all of those things were greatly enhanced by the testimony of these two witnesses, and, in fact, were probably the only evidence as to those factors.

(PC-R2. 473-74). Obviously, evidence that their testimony was lacking veracity was crucial impeachment evidence.

It simply cannot be concluded that confidence is not undermined in the verdict in this case where the jury heard false testimony to the effect that Mr. Lightbourne had the victim "crawling around on the floor and sucking his penis" and the victim was "screaming and hollering" (R. 603-604). *Porter* instructs that "it was not reasonable to discount entirely the effect that [this false] testimony might have had on the jury or the sentencing judge." *Porter v. McCollum*, 130 S. Ct. at 455. This Court's materiality analysis was sorely lacking and was an unreasonable application of *Brady*, in violation of *Porter*.

CONCLUSION

Based on the foregoing, Mr. Lightbourne respectfully requests that this Honorable Court find that the *Porter* claim is properly before this Court and grant a new penalty phase based on the deprivation of the effective assistance of counsel and a new guilt phase based on the *Brady* claim.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to Kenneth S. Nunnelley, Assistant Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, FL 32118 this __ day of August, 2011.

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